Filed 8/30/06 In re Alex A. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ALEX A., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ALEX A., Defendant and Appellant.	E038345 (Super.Ct.No. J191318) OPINION

APPEAL from the Superior Court of San Bernardino County. Douglas N. Gericke, Judge. Affirmed.

Andrew E. Rubin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-

Ladendorf, Supervising Deputy Attorney General, and Erika Hiramatsu, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Alex A. (minor) admitted as true the allegation in a Welfare and Institutions Code section 602 petition that charged him with grand theft from a person (Pen. Code, § 487, subd. (c).)[1] At a contested dispositional hearing, the prosecution sought to require minor to register as a gang member under section 186.30. The court found by a preponderance of the evidence that the grand theft committed by minor was gang related, within the meaning of section 186.30. The court thus ordered minor to register as a gang member within 10 days of his release.

On appeal, minor contends that: 1) the juvenile court improperly utilized the preponderance of the evidence standard of proof in determining whether his crime was gang related; and 2) there was insufficient evidence to support the court's finding that minor's crime was gang related. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 2005, minor and his cohort asked two individuals (the victims), "Where are you from?" They then robbed the victims of their wallets at knife point (the incident).

On February 18, 2005, the district attorney filed a Welfare and Institutions Code section 602 petition alleging second degree robbery (§ 211, count 1), attempted second

[1] All further statutory references will be to Penal Code, unless otherwise noted.

degree robbery (§ 664/211, count 2), and street terrorism (§ 186.22, subd. (a), count 3). Minor denied the allegations.

On March 30, 2005, the court granted the district attorney's motion to add one count of grand theft from a person (§ 487, subd. (c), count 4) and to dismiss counts 1 through 3. Minor voluntarily admitted the allegation in count 4, and the court accordingly found the allegation true.

On April 27, 2005, the court granted minor probation and placed him in juvenile hall pending placement in a foster care facility.

At a contested dispositional hearing on June 8, 2005, the district attorney sought to require minor to register as a gang member under section 186.30. Officer Chris Tusant, a gang expert, testified at the hearing. Officer Tusant had been working in the gang unit of the City of Colton Police Department for two years, had numerous hours of formalized gang training, had taught gang classes, and had qualified as a gang expert and testified as a gang expert several times. He was very familiar with the North Side Colton Gang (the gang), having had daily contact with its members through the course of his work. The gang was commonly identified by the letters "NSC," "NC," "NS," or "N." Its members wore the University of North Carolina Tar Heels logo and symbol on their clothing. Out of the approximately 250 documented members of the gang, Officer Tusant had personally contacted 170 of them. The gang had a pattern of criminal activity. Specifically, Officer Tusant testified regarding three self-admitted members of the gang—two of them were convicted of carjacking with a gang enhancement, and one was convicted of assault with a knife with a gang enhancement.

Officer Tusant first met minor on the day he was arrested for the incident. He contacted minor at his school. Minor had a backpack with an Old English-style letter "N" on it. Officer Tusant examined the contents of the backpack and found minor's school "tardy card." On the back of the tardy card were the letters "NSC" and the name "Alley Boy," written in Old English-style lettering. The "NSC" lettering was consistent with the "N" on the outside of the backpack. Officer Tusant testified that the "NSC" stood for North Side Colton Gang, and "Alley Boy" was consistent with a moniker. He also found school paperwork with minor's name on it. On the back side of the paper, there was an "N" written in the same style as on the tardy card and the backpack.

Officer Tusant did not believe minor was a documented member of the gang. Rather, he characterized minor as an affiliate of the gang, based on the items found in his backpack. Minor lived in the heart of the gang's territory, and his brother had been a member of the gang for six years. Minor told the officer that he wanted the gang members to like him and that he tended to align with them.

Officer Tusant opined that minor's crime was committed to benefit the gang. Minor committed the crime with another gang affiliate. The crime was committed next to a well-populated high school, where there were members of other gangs present. Thus, this type of violent crime would bolster minor's status, as well as the gang's status. Furthermore, during the commission of the theft, minor and/or his cohort asked the victims, "Where are you from?" Officer Tusant testified that this question, in gang culture, was an inquiry as to gang membership. If the victims happened to say they were from the same gang, the theft probably would not have occurred.

The court found by a preponderance of the evidence that the theft committed by minor was gang related. The court then imposed the registration requirement.

ANALYSIS

I. The Trial Court Properly Utilized the Preponderance of the Evidence Standard in Finding That Minor's Crime Was Gang Related

Minor argues that the court was required to find that his crime was gang related beyond a reasonable doubt, pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296. We disagree.

If a court sustains a juvenile court petition for "[a]ny crime that the court finds is gang related," the juvenile offender is required to register as a gang member with law enforcement for the next five years. (§§ 186.30, subd. (b)(3) & 186.32, subd. (c).) In *Apprendi*, the United States Supreme Court held that due process requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490.) The issue in the instant case is whether "gang registration is an additional punishment, constituting an increase in the maximum punishment otherwise available for the crime[] at issue." (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 942 (*Jorge G.*).) The court in *Jorge G.* considered this issue and rejected minor's exact claim.

In *Jorge G.*, the court examined *People v. Castellanos* (1999) 21 Cal.4th 785 (*Castellanos*), in which the California Supreme Court considered the issue of whether registration as a sex offender pursuant to section 290 constituted punishment for purposes

of analysis under the prohibition on ex post facto laws. There was no majority opinion in *Castellanos* but two concurring opinions concluded that: 1) the Legislature did not intend sex offender registration to constitute punishment; and 2) the provision was not so punitive as to constitute punishment. (*Jorge G.*, *supra*, 117 Cal.App.4th at p. 942; *Castellanos*, *supra*, 21 Cal.4th at p. 796.) Applying the same two factors, the *Jorge G.* court held that "gang-member registration under section 186.30 is not punishment for due process purposes under *Apprendi*." (*Jorge G.*, *supra*, 117 Cal.App.4th at p. 942-943.) The court commented that the section 186.30 registration requirement was no more punitive than sex offender registration and that it was, in fact, "substantially less onerous because sex-offender registration is for life, while gang-member registration is only for five years from the last imposition." (*Id*. at p. 943.) In light of its decision that registration pursuant to section 186.30 was not punishment for purposes of due process under *Apprendi*, the court concluded that "the fact that the subject crime was gang related need be proved only by a preponderance of the evidence." (*Jorge G., supra,* 117 Cal.App.4th. at p. 944.)

Minor argues that the analysis in *Jorge G*. is flawed because it "uses pre-*Apprendi* law to define punishment in a post-*Apprendi* world." He claims that "the language in *Apprendi* regarding what factors are subject to jury and beyond a reasonable doubt limitations . . . include the registration requirement found in [] section 186.30." Minor's argument is untenable. Contrary to his claim, the section 186.30 registration requirement itself is not a sentencing factor. Moreover, *Apprendi* did not discuss or change the way punishment is defined. *Apprendi* only decided the narrow issue of whether due process

required any fact that increased the maximum prison sentence for an offense to be found by a jury on the basis of proof beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 469.)

In sum, the registration requirement for gang members does not constitute punishment. (*People v. Bailey* (2002) 101 Cal.App.4th 238, 244.) It has a short, finite term and serves a legitimate purpose—protecting the public from gang-related violent crime. (*Ibid*.) Because the registration requirement does not constitute punishment, the finding supporting it need only be based on a preponderance of the evidence. (*Jorge G.*, *supra*, 117 Cal.App.4th at pp. 943-944.)

II. There Was Sufficient Evidence to Support the Court's Finding That Minor's Crime Was Gang Related

Minor argues that the court had insufficient evidence to find that the grand theft was gang related, and thus he should not be required to register pursuant to section 186.30. We disagree.

A. Standard of Review

When an appellant asserts there is insufficient evidence to support a court's finding on gang-relatedness, we review the record in a light most favorable to the judgment "'to determine whether there is substantial evidence . . . from which a reasonable trier of fact could have made the requisite finding. . . .' [Citation.]" (*Jorge G.*, *supra*, 117 Cal.App.4th at pp. 941-942.)

B. There Was Sufficient Evidence

"A crime is gang related if it is related to a criminal street gang as defined in section 186.22, subdivisions (e) and (f). The elements of this definition require: (1) an ongoing organization or group, (2) of three or more persons, (3) having as one of its primary activities the commission of the crimes enumerated in section 186.22, subdivision (e)(1)-(25), (4) having a common name or symbol, and (5) whose members individually or collectively have engaged in a pattern of criminal gang activity. This pattern of gang activity must consist of: (a) two or more of the offenses enumerated in section 186.22, subdivision (e)(1)-(25), provided that at least one offense occurred after the effective date of the statute; (b) the last offense occurred within three years of the one before it; and (c) the offenses were committed on separate occasions or by two or more persons." (*Jorge G., supra,* 117 Cal.App.4th at p. 944.) "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) Furthermore, gang-related crimes include those that are "committed for the benefit of, at the direction of, or in association with a criminal street gang." (*Jorge G., supra,* 117 Cal.App.4th at p. 941.)

Here, Officer Tusant, a gang expert, testified that North Side Colton Gang was a criminal street gang. It had about 250 documented members; its primary activities included the commission of carjackings (§ 186.22, subd. (e)(21), assault (§ 186.22, subd. (e)(1), and theft (§ 186.22, subd. (e)(9); it had a common name (North Side Colton Gang)

and symbols ("NSC," "NS," "NC," "N"); and it had established a pattern of criminal activity.

Moreover, Officer Tusant opined that minor's crime was committed to benefit the gang. Minor was an affiliate of the gang, as evidenced by his backpack, which had the gang's symbol written on it and contained papers that also had the gang's symbols, as well as an apparent moniker, written on them. Minor lived in the heart of the gang's territory, and his brother had been a member of the gang for six years. Furthermore, he committed the crime with another gang affiliate, next to a well-populated high school, where there were members of other gangs present; thus, as Officer Tusant testified, this type of violent crime would bolster minor's status, as well as the gang's status. Moreover, during the commission of the theft, minor and/or his cohort asked the victims, "Where are you from?" Officer Tusant testified that this question, in gang culture, was an inquiry as to gang membership.

Minor specifically argues that there was insufficient evidence that the gang had, as one of its primary activities, the commission of the crimes enumerated in section 182.66, subdivision (e). As indicated by the court, the evidence showed that more than two of the gang's members had committed criminal acts, including carjackings and robberies. The court specifically noted that minor's offense was consistent with the types of crimes the gang committed—essentially taking property by means of force or fear. Such evidence was sufficient. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 323.)

Minor also raises the issue that the term "gang related" in section 186.30 is unconstitutionally vague, merely to preserve it for potential federal court review. He

acknowledges that *Jorge G.* found otherwise. In view of *Jorge G.*, we reject minor's claim. (*Jorge G.*, *supra*, 117 Cal.App.4th at pp. 938-941.)

Minor further complains that the prosecution failed to have Officer Tusant "declared" to be an expert. Minor did not object to Officer Tusant testifying as an expert witness at the hearing. Therefore, he has waived this claim. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) In any case, "California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness [citation] and to give testimony in the form of an opinion. [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Officer Tusant had substantial gang training and experience working with gangs, and he had testified as a gang expert several times.

Viewing the evidence in a light most favorable to the judgment under the preponderance of the evidence standard, we conclude that there was sufficient evidence that minor's crime was gang related.

DISPOSITION

The judgment is affirmed.

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/s/ Hollenhorst
Acting P.J.

We concur:

/s/ McKinster
J.

/s/ King
J.